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Before the
Federal Communications Commission
Washington, D.C. 20554

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Petition of Time Warner Cable)
for Preemption Pursuant to Section 253)
of the Communications Act, as Amended.)

Docket No. _____

PETITION FOR PREEMPTION

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Pursuant to Sections 1.1 and 1.2 of the Commission's rules¹ and Section 253 of the Communications Act of 1934 (the "Act"), as amended,² Time Warner Cable and its South Carolina telecommunications affiliate, Time Warner Cable Information Services (South Carolina), LLC (collectively, "Time Warner Cable"), hereby request that the Commission issue an order to eliminate obstacles that the South Carolina Public Service Commission (the "PSC") has placed in the way of competition in local telephone service. As described in the Petition for Declaratory Ruling filed in conjunction with this Petition, the PSC has refused to allow Time Warner Cable to rely on its wholesale supplier, MCI WorldCom Network Services, Inc. ("MCI"),³ to obtain access to the public switched telephone network ("PSTN") in areas served by rural LECs. In addition, the PSC has denied Time Warner Cable itself a certificate of public convenience and necessity

¹ 47 C.F.R. §§ 1.1, 1.2.

² 47 U.S.C. § 253.

³ Time Warner Cable's contractual arrangements with MCI have been assigned to Verizon Business by virtue of MCI's recent merger with Verizon.

("CPCN"). In South Carolina, Time Warner Cable needs a CPCN to obtain its own interconnection agreements with such rural LECs and to introduce competitive telecommunications services—including wholesale telecommunications services necessary for the retail provision of VoIP-based residential telephone service. As the Commission has held in nearly identical circumstances, the PSC's refusal to grant a CPCN squarely violates Section 253 of the Act.

In light of the insurmountable barrier to entry erected by the PSC, Time Warner Cable requests that the Commission adjudicate this petition on an expedited basis.⁴

Background

In 2003, Time Warner Cable deployed a facilities-based competitive telephone service branded as Digital Phone using VoIP technology, later expanding the service to each of its 31 local divisions. At the time of its deployment of Digital Phone, Time Warner Cable recognized that much regulatory uncertainty existed with respect to VoIP-based telephone services and that the regulatory classification of VoIP-based services was the subject of a rulemaking by this Commission. Time Warner Cable accordingly chose to comply with state regulations that govern competitive telecommunications services. In order to provide its Digital Phone service, therefore, Time Warner Cable, through its telecommunications carrier affiliates, obtained state certifications to operate

⁴ See *Suggested Guidelines for Petitions for Ruling Under Section 253 of the Communications Act*, Public Notice, 13 FCC Rcd 22970, 22973-74 (1998) ("If the matter presented in the petition is of an urgent nature, the Bureau may, where it determines good cause exists," adopt an expedited schedule for both comments and replies.). Here, expedition is necessary in light of the severe anticompetitive impact of the South Carolina PSC's decisions, which, as explained below, are withholding the benefits of telephone competition from tens of thousands of rural consumers.

as a competitive local and interexchange voice services provider. Time Warner Cable and its affiliates now hold CPCNs in 20 states. In obtaining state authorizations, Time Warner Cable expressly reserved its right to modify its policies in conformity with changes to the legal and regulatory regime applicable to VoIP-based services.⁵

Time Warner Cable's Digital Phone service has offered a competitive alternative to millions of consumers who previously were denied a choice of voice provider, and they have responded with great enthusiasm: Time Warner Cable now serves more than one million residential voice customers, with approximately 50,000 new customers signing up each month. Digital Phone has achieved penetrations in local service areas of up to 12 percent in less than two years.⁶ Consumers reap the rewards from the roll-out of Digital Phone in the form of lower prices, better quality, and more innovative features.⁷

⁵ Consistent with this approach, Time Warner Cable has provided E911 service in all of its service territories since its first Digital Phone deployment. Time Warner Cable also has contributed and continues to contribute to federal and state universal service support mechanisms. In addition, Time Warner Cable complies with the intercarrier compensation rules applicable to telecommunications services, and thus pays interstate and intrastate access charges where appropriate.

⁶ Press Release, Time Warner Inc., *Time Warner Reports First Quarter 2005 Results* (May 4, 2005), available at <http://www.timewarner.com/corp/newsroom/pr/0,20812,1057181,00.html>.

⁷ Digital Phone provides unlimited local, in-state, and long distance calling to the U.S. and Canada, as well as call waiting, caller ID, and additional features for a flat monthly fee. Subscribers can make and receive calls using virtually any commercially available handset, and they have access to toll-free calling, international calling, directory assistance, operator services, and telecommunications relay services. Customers switching to Digital Phone can keep their existing landline telephone numbers and retain or change their current directory listings. Moreover, Digital Phone enables Time Warner Cable to offer customers added value, convenience, and other benefits associated with its combined package of video, high-speed data, and voice services.

To ensure that its Digital Phone service offers customers the ability to call and be called by end users on the PSTN in South Carolina, Time Warner Cable entered into a business relationship with a circuit-switched competitive telecommunications carrier, MCI, that already held a CPCN in South Carolina and elsewhere. As part of this arrangement, MCI agreed to provide transport necessary to terminate Time Warner Cable's VoIP-originated traffic to the PSTN and deliver PSTN-originated traffic to Time Warner Cable by, among other things, entering into interconnection agreements with incumbent LECs. MCI also agreed to assist in providing E911-related connectivity; performing local number portability; administering, paying, and collecting intercarrier compensation; transporting and terminating long-distance traffic; and providing operator services and directory assistance. Through this arrangement, Time Warner Cable has been able to deploy its service quickly, without the need to enter into drawn-out negotiations with numerous incumbent LECs and without the need to duplicate already-existing interconnection facilities.

Before introducing Digital Phone service in South Carolina, Time Warner Cable requested in December 2003 that the PSC grant it a CPCN to provide local and interexchange voice services throughout the state. The PSC granted that request in part in May 2004, concluding that Time Warner Cable was financially qualified; it possessed the requisite managerial and technical resources to provide local and interexchange services; and it met the other South Carolina statutory requirements for obtaining a CPCN.⁸ By its terms, however, the PSC's order authorized Time Warner Cable to

⁸ See *Application of Time Warner Cable Information Services (South Carolina), LLC, for a Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services and for Alternative Regulation pursuant to S.C. Code Section 58-9-575*

provide service only in areas of South Carolina where the incumbent LEC is not entitled to the rural exemption set forth in 47 U.S.C. § 251(f)(1).⁹

On October 1, 2004, Time Warner Cable returned to the PSC, requesting permission to provide service in the areas carved out from its initial authorization. Specifically, Time Warner Cable filed two new applications: one for the rural areas served by Alltel South Carolina, Inc.,¹⁰ and one for areas served by a group of smaller rural ILECs (the "RLECs") (including Farmers Telephone Cooperative, Inc., Fort Mill Telephone Company, Inc., Home Telephone Company, Inc., PBT Telecom, Inc., and St. Stephen Telephone Company).¹¹ In each application, Time Warner Cable requested that, in the areas served by RLECs, Time Warner Cable be authorized to provide the same

and 58-9-585, Order Granting Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services and for Alternative Regulation and Modified Flexible Regulation, Docket No. 2003-362-C, Order No. 2004-213 (May 24, 2004) ("*Initial CPCN Order*"). For the Commission's convenience, we have attached copies of documents filed before the South Carolina PSC and relevant orders of the PSC; the *Initial CPCN Order* is Tab 1, attached hereto.

⁹ See *id.* at 13. To resolve objections filed by the South Carolina Telephone Coalition ("SCTC") (representing rural LECs) and to expedite its introduction of service to most parts of the state, Time Warner Cable entered into a stipulation with SCTC pursuant to which Time Warner Cable agreed not to provide voice services in areas served by certain rural LECs before July 1, 2004. *Id.* at 2-3.

¹⁰ Time Warner Cable Information Services (South Carolina), LLC, *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Alltel South Carolina, Inc.'s Service Areas*, Docket No. 2004-279-C (PSCSC filed Oct. 1, 2004) ("*Alltel Application*") (Tab 2, attached hereto).

¹¹ Time Warner Cable Information Services (South Carolina), LLC, *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption*, Docket No. 2004-280-C (PSCSC filed Oct. 5, 2004) ("*RLEC Application*") (Tab 3, attached hereto).

kind of competitive voice service as it currently is authorized to provide elsewhere in *South Carolina*.¹²

Approximately six weeks after Time Warner Cable filed these two applications, this Commission issued an order in the case of *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning and Order of the Minnesota Public Utilities Commission* (the “*Vonage Order*”), in which it preempted Minnesota regulations requiring that VoIP-based providers obtain a CPCN, file tariffs, and comply with similar obligations.¹³ The Commission further stated that other states’ regulations likewise would be preempted and that cable operators providing qualifying VoIP-based services would similarly be subject to the same level of preemption of state certification and tariffing requirements.¹⁴ In the wake of that order, Time Warner Cable notified other state commissions that it no longer intended to provide retail VoIP-based service pursuant to a CPCN or tariff.¹⁵ In South Carolina, however, Time Warner Cable persisted in its request for a certificate, for several reasons.

As Time Warner Cable explained to the PSC, it ultimately intended to enter into interconnection agreements with incumbent LECs (thus eliminating the need for a

¹² See *Alltel Application* at 1; *RLEC Application* at 1.

¹³ *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, WC Docket No. 03-211, 19 FCC Rcd 22404, 22423-24 ¶¶ 31-32 (2004).

¹⁴ *Id.* at 22423-24 ¶¶ 31-32, 22426 ¶ 35.

¹⁵ Nonetheless, Time Warner Cable continues to comply in all states with 911 regulations, state and federal universal service payment requirements, intercarrier compensation regimes, numbering rules, and the Communications Assistance for Law Enforcement Act, among other things.

wholesale provider such as MCI); at that time, it would need a certificate to enter into Section 251 interconnection agreements with incumbent LECs.¹⁶ Time Warner Cable also informed the PSC that it intended to provide other regulated telecommunications services—not covered by the *Vonage Order*—pursuant to certificate and tariff, such as private-line and back-haul transport services.¹⁷ Moreover, based on its inability—through both its wholesale provider (MCI) and on its own—to make headway in interconnection negotiations with rural LECs, Time Warner Cable ultimately concluded that it was willing to provide retail VoIP-based services as a certificated CLEC, in contrast to its status in most states.

After Alltel declined to oppose, the PSC granted Time Warner Cable's application to provide service in Alltel's rural service area.¹⁸ In granting the application, the PSC specifically found that Time Warner Cable "has the financial, managerial, and technical

¹⁶ See *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend Certificate of Public Convenience and Necessity Granted to it under Commission Order No. 2004-213*, Hearing Transcript, Docket No. 2004-280-C, at 70-74, 129 (PSCSC Mar. 31, 2005) ("*Hearing Transcript*") (Tab 4, attached hereto).

¹⁷ At a hearing concerning the *RLEC Application*, Time Warner Cable's Vice President and Chief Telephony Counsel answered the question whether Time Warner Cable is "basically [trying] to provide the services for yourselves rather than [MCI] providing the services for you which they are doing today," as follows: "Yes and also to provide other regulated services to commercial businesses as we see fit, to provide commercial transport services and business telecom services." *Id.* at 74.

¹⁸ *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Alltel South Carolina, Inc.'s Service Areas*, Amended Order Granting Amendment to Certificate, Docket No. 2004-279-C (PSCSC July 27, 2005) ("*Amended Alltel CPCN Order*") (Tab 5, attached hereto).

resources to provide the expanded local service to the Alltel service area,”¹⁹ and that Time Warner Cable “continues to meet all statutory requirements for the provision of service as a CLEC.”²⁰

Despite these findings, the PSC denied the *RLEC Application*. With respect to the *RLEC Application* as originally filed (*i.e.*, Time Warner Cable’s request for a certificate to provide retail VoIP-based local and interexchange services, among other things), the PSC stated that it had “very little choice as to how to rule in this matter,” apparently because Time Warner Cable had not requested “a waiver of the rural exemptions of the RLECs subject to the Telecommunications Act of 1996.”²¹ The PSC, however, failed to explain why section 251(f)—which provides limited exemptions from the duties in section 251(c)—has any bearing on Time Warner Cable’s entitlement to a CPCN. With respect to the *RLEC Application* as subsequently amended (*i.e.*, Time Warner Cable’s request for a certificate to provide wholesale telecommunications service and retail private line and transport services), the PSC opined that Time Warner Cable was requesting “only the authority to enter into negotiations toward interconnection agreements with the local exchange companies under the rural exemption.”²² Because, in

¹⁹ *Id.* at 5.

²⁰ *Id.*

²¹ *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption*, Order Ruling on Expansion of Certificate, Docket No. 2004-280-C, at 5 (PSCSC Aug. 1, 2005) (“*RLEC Order*”) (Tab 6, attached hereto).

²² *Id.*

the PSC's view, Time Warner Cable already had "the ability to enter into these negotiations under Section 251 of the Telecommunications Act of 1996,"²³ it concluded that "[n]o expanded Certificate is needed."²⁴

The PSC later denied Time Warner Cable's petition for reconsideration.²⁵ The PSC asserted that Time Warner Cable's decision to obtain a CPCN in order to provide wholesale services, rather than retail VoIP services, constituted a change of position that purportedly undercut Time Warner Cable's entitlement to a certificate.²⁶ The PSC also insisted that its denial of certification did not constitute a "barrier to entry" under section 253 of the Act because "[a]ssuming that [Time Warner Cable] is a telecommunications carrier, . . . [Time Warner Cable] does not need this Commission's approval to proceed under Section 251" and request interconnection from the rural incumbent LECs.²⁷

That conclusion has since proven incorrect. Since Time Warner Cable was denied a CPCN and denied reconsideration of that decision, Time Warner Cable has attempted to commence negotiations with the RLECs for interconnection pursuant to Section 251. The RLECs have refused to negotiate with Time Warner Cable on the ground that, in the areas served by the RLECs, Time Warner Cable is not a certificated

²³ *Id.*

²⁴ *Id.*

²⁵ *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Interexchange and Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption*, Order Denying Rehearing or Reconsideration, Docket No. 2004-280-C (Sept. 26, 2005) (Tab 7, attached hereto).

²⁶ *Id.* at 2-3.

²⁷ *Id.* at 5-6.

telecommunications carrier entitled to interconnection pursuant to the Act. This refusal to negotiate with Time Warner Cable is a violation of the RLECs' duty under the Act to negotiate in good faith. As discussed above, Time Warner Cable holds a CPCN as a recognized telecommunications carrier in most portions of the State of South Carolina. Moreover, it is well settled law that, in performing its duty to negotiate in good faith, an incumbent LEC may not condition such negotiation upon a requesting party first obtaining a state certification.²⁸ Accordingly, Time Warner Cable has filed complaints against the RLECs with the South Carolina PSC on the ground that the RLECs are refusing to negotiate with Time Warner Cable in violation of their Section 251 obligations.

Despite its initial ruling that Time Warner Cable has "the ability to enter into [interconnection] negotiations under Section 251 of the Telecommunications Act of 1996,"²⁹ the PSC has not yet acted on Time Warner Cable's complaints. To the contrary, in an arbitration concerning MCI's unsuccessful attempts to interconnect with the RLECs in order to provide wholesale services to Time Warner Cable, the PSC opined that "VoIP providers do not have rights or obligations under Section 251" and, accordingly, the RLECs "should not be required to provide indirectly (through MCI as an intermediary) what they would not be required to provide directly."³⁰ Thus, the PSC appears to have

²⁸ 47 C.F.R. § 51.301(c)(4).

²⁹ *RLEC Order* at 5.

³⁰ *Petition of MCI Metro Access Transmission Services, LLC for Arbitration of Certain Terms and Conditions of Proposed Agreement with Farmers Telephone Cooperative, Inc., Home Telephone Co., Inc., PBT Telecom, Inc., and Hargray Telephone Company, Concerning Interconnection and Resale under the Telecommunications Act of 1996*, Order Ruling on Arbitration, Docket No. 2005-67-C, at 9, 17 (PSCSC Oct. 7, 2005)

abandoned its initial contention that Time Warner Cable may obtain interconnection from the RLECs without a CPCN, apparently rendering futile any further efforts to obtain relief at the state level.

Argument

The PSC's refusal to grant Time Warner Cable a CPCN in the areas served by RLECs has the effect of prohibiting Time Warner Cable from providing telecommunications services in those markets and thus violates Section 253 of the Act. The Commission has consistently ruled that withholding a CPCN constitutes a barrier to entry that cannot be squared with Congress's market-opening mandates. The Commission should promptly remedy the PSC's violation because, as a direct result of its decisions, consumers in rural South Carolina are being denied a choice in local telephone service.

The standard governing preemption under Section 253 is well settled.³¹ Section 253 "expressly empowers—indeed, obligates—the Commission to remove any state or local legal mandate that 'prohibit[s] or has the effect of prohibiting' a firm from providing any interstate or intrastate telecommunications service."³² Once the

(*"MCI Arbitration Order"*) (Tab 8, attached hereto). For further information on the PSC's refusal to permit MCI to obtain interconnection from the RLECs to provide wholesale telecommunications service to Time Warner Cable, see the Declaratory Ruling Petition filed by Time Warner Cable in conjunction with this petition.

³¹ Pursuant to Section 253(a), "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a).

³² *Public Utility Commission of Texas*, Memorandum Opinion and Order, 13 FCC Rcd 3460, 3470 ¶ 22 (1997) (*"Texas Preemption Order"*); see *id.* at 3480 ¶ 41 (Congress enacted Section 253 "to ensure that no state or local authority could erect legal barriers to

Commission determines that a state's order prohibits or has the effect of prohibiting the provision of service, it then determines whether that order falls within the exception set forth in Section 253(b).³³ Section 253(b) provides that a state may "impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers."³⁴ If the state's order is impermissible under Section 253(a) and does not satisfy the requirements of Section 253(b), the Commission "must preempt the enforcement of [that order] in accordance with section 253(d)."³⁵

As shown below, there can be no doubt that the PSC's denial of a CPCN authorizing Time Warner Cable to serve rural portions of South Carolina has the effect of prohibiting Time Warner Cable from providing service in violation of Section 253(a), and is not remotely necessary to achieve any of the public interest goals embodied in

entry that would potentially frustrate the 1996 Act's explicit goal of opening local markets to competition."). The Commission has interpreted Section 253 broadly as a "command[] . . . to sweep away not only those state or local requirements that explicitly and directly bar an entity from providing any telecommunications service, but also those . . . that have the practical effect of prohibiting an entity from providing service." *Id.* at 3470 ¶ 22.

³³ *Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling*, Memorandum Opinion and Order, 12 FCC Rcd 15639, 15655-56 ¶ 37 (1997) ("*Wyoming Preemption Order*"), *aff'd*, *RT Communications, Inc. v. FCC*, 201 F.3d 1264 (10th Cir. 2000).

³⁴ 47 U.S.C. § 253(b).

³⁵ *Wyoming Preemption Order*, 12 FCC Rcd at 15656 ¶ 37. Section 253(d) directs the Commission to "preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation [of,] or inconsistency [with, Section 253(a)]. 47 U.S.C. § 253(d).

Section 253(b). The Commission accordingly should declare the PSC's denial of a CPCN a violation of Section 253 and direct the PSC to issue prompt relief.

I. THE PSC'S REFUSAL TO GRANT TIME WARNER CABLE A CERTIFICATE TO PROVIDE SERVICE TO RURAL CUSTOMERS VIOLATES SECTION 253(a).

The PSC's denial of Time Warner Cable's application for a CPCN strikes at the very core of what Section 253(a) prohibits.³⁶ As the Commission has noted, "section 253(a), at the very least, proscribes State and local legal requirements that prohibit all but one entity from providing telecommunications services in a particular State or locality."³⁷ The PSC's order does precisely that: By denying Time Warner Cable a certificate for the rural service territories at issue, it effectively means that only the RLECs may provide telecommunications services in those areas.

The Commission has confirmed on several occasions, in nearly identical circumstances, that refusing to grant a new entrant's application for a CPCN is a prohibition within the meaning of section 253(a). In the *Wyoming Preemption* proceeding, for example, the Commission was confronted with a state policy that allowed RLECs serving 30,000 lines or fewer to bar the grant of a CPCN until 2005. The Commission held that this effort to shield rural LECs from competition ran afoul of Section 253(a).³⁸ Similarly, the Commission later preempted other state orders that

³⁶ See *Texas Preemption Order*, 13 FCC Rcd at 3511 ¶ 107 (ruling that a Texas regulation that "flatly prohibits the Texas Commission from granting a [certificate of authority] in the specified territories . . . is in direct conflict with section 253(a), which is designed to prevent such restrictions on entry."); *Wyoming Preemption Order*, 12 FCC Rcd at 15657 ¶ 39.

³⁷ *Wyoming Preemption Order*, 12 FCC Rcd at 15656 ¶ 38.

³⁸ *Id.* at 15656-57 ¶¶ 38-39.

denied CPCNs pursuant to similar policies,³⁹ in one case finding that a “regulation that flatly prohibits the Texas Commission from granting a [certificate of authority] in the specified territories . . . is in direct conflict with section 253(a), which is designed to prevent such restrictions on entry.”⁴⁰ The PSC’s order denying Time Warner Cable a CPCN constitutes a comparable prohibition on serving the rural markets in South Carolina.

Although the PSC’s reasoning is not clear, it appears to have concluded—at least initially—that competitive entry should not be permitted until the PSC has terminated the RLECs’ rural exemption under Section 251(f)(1).⁴¹ That conclusion is fundamentally wrong. Under Section 251(f)(1), an RLEC is immune from the obligations in Section 251(c) until the state commission determines that subjecting the RLEC to such duties “is not unduly economically burdensome, is technically feasible, and is consistent with section 254.”⁴² But that means only that, until the state commission makes such a finding, the RLEC cannot be forced to provide the kind of interconnection contemplated in Section 251(c)(2), the unbundled network elements described in Section 251(c)(3), and

³⁹ *AVR, L.P. d/b/a Hyperion of Tennessee, L.P., Petition for Preemption of Tennessee Code Annotated § 65-4-201(D) and Tennessee Regulatory Authority Decision Denying Hyperion’s Application Requesting Authority to Provide Service in Tennessee Rural LEC Service Areas*, Memorandum Opinion and Order, CC Docket No. 98-92, 14 FCC Rcd 11064, 11071 ¶ 15 (1999) (“*Tennessee Preemption Order*”); *Texas Preemption Order*, 13 FCC Rcd at 3511 ¶ 106.

⁴⁰ *Texas Preemption Order*, 13 FCC Rcd at 3511 ¶ 107.

⁴¹ See *RLEC Order* at 5 (stating that, because Time Warner Cable did not seek a waiver of the rural exemptions in Section 251(f), the PSC had “little choice as to how to rule in this matter”).

⁴² 47 U.S.C. § 251(f)(1)(A).

the resale services described in Section 251(c)(4). It does not mean that RLECs are immune from complying with Section 251(a) or shielded from competition by firms that can compete without invoking any rights granted in Section 251(c).

The Commission has specifically so held. In the *Tennessee Preemption Order*, the Commission recognized that Section 251(f), far from supporting denial of a certificate, strongly militates against it: “In choosing less competitively restrictive means of protecting rural and small LECs, . . . Congress revealed its intent to preclude states from imposing the far more competitively restrictive protection of an absolute ban on competition.”⁴³ The Commission reached the same conclusion in the *Wyoming Preemption Order*,⁴⁴ finding that Congress’s decision to provide limited “accommodations to the unique circumstances of rural telephone companies, like those in section 251(f), indicate[s] that Congress did *not* contemplate that States could ‘protect’ rural telephone companies with the much more competitively restrictive method of a categorical ban on entry.”⁴⁵ The PSC’s reliance on section 251(f) as a ground for denying Time Warner Cable a certificate therefore is plainly unavailing.

Nor was the PSC correct—as a legal or factual matter—that Time Warner Cable does not need (and therefore may not obtain) a certificate to request interconnection from the RLECs.⁴⁶ While the PSC initially asserted that Time Warner Cable does not need a

⁴³ *Tennessee Preemption Order*, 14 FCC Rcd at 11073 ¶ 18 n.50.

⁴⁴ *Wyoming Preemption Order* 12 FCC Rcd at 15659 ¶ 44.

⁴⁵ *Id.* (emphasis added).

⁴⁶ *See RLEC Order* at 5.

certificate to provide the kind of services that it plans to offer, the record and applicable authority demonstrate otherwise. The governing state statute provides that the PSC shall “provide for the reasonable interconnection of facilities between all *certificated* local telephone service providers upon a bona fide request for interconnection.”⁴⁷ Not surprisingly, and as demonstrated by the RLECs’ refusal to negotiate with Time Warner Cable since the PSC’s certification denial, incumbent LECs in South Carolina will not sell interconnection services without proof of certification.⁴⁸ The RLECs’ own expert opined that Time Warner Cable cannot even begin the process of obtaining interconnection until Time Warner Cable receives a CPCN from the PSC.⁴⁹ Such an opinion mischaracterizes the RLECs’ obligations; refusing to negotiate with Time Warner Cable is a direct violation of the Commission’s rules.⁵⁰ But the RLECs nevertheless relied on this position in refusing interconnection and thereby foreclosing Time Warner Cable’s entry, and the PSC’s rulings provided a veneer of legitimacy to that anticompetitive conduct. The PSC’s efforts to protect rural carriers are restricted to the mechanisms clearly set forth in Section 251(f), and the expansion of that provision

⁴⁷ S.C. Code § 58-9-280(C)(1) (Supp. 2004) (emphasis added).

⁴⁸ See *Application of Time Warner Cable Information Services (South Carolina), LLC, d/b/a Time Warner Cable to Amend its Certificate of Public Convenience and Necessity to Provide Local Voice Services in Service Areas of Certain Incumbent Carriers who Currently Have a Rural Exemption*, Petition for Rehearing or Reconsideration of Order No. 2005-412 of Time Warner Cable Information Services (South Carolina), LLC, Docket No. 2004-280-C at 5 (PSCSC Aug. 15, 2005) (“*Petition for Reconsideration of RLEC Order*”) (Tab 9, attached hereto) (citing various interconnection agreements).

⁴⁹ *Hearing Transcript* at 166.

⁵⁰ See 47 C.F.R. § 51.301(c)(4).

through the denial of Time Warner Cable's certificate and competitive entry should be corrected by this Commission.

Moreover, the PSC itself appears to have repudiated its initial holding that Time Warner Cable has "the ability to enter into [interconnection] negotiations under Section 251 of the Telecommunications Act of 1996."⁵¹ As noted above, the PSC later held that, since the rights and obligations of VoIP providers have not yet been determined, the RLECs are not obligated to negotiate for interconnection with Time Warner Cable directly (or interconnect through MCI).⁵²

Contrary to the PSC's more recent theory, the current uncertainty regarding the statutory classification of VoIP services does not undermine Time Warner Cable's right as a telecommunications carrier to obtain interconnection—and thus does not affect Time Warner Cable's entitlement to preemption under section 253. While the PSC's certification order focused exclusively on Time Warner Cable's consumer VoIP services, its refusal to grant a CPCN also prevents Time Warner Cable from providing telecommunications services to enterprise customers, such as private line and transport services. Time Warner Cable intends to offer such services and made this intention clear to the PSC.⁵³ Without interconnecting with the PSTN, Time Warner Cable cannot offer such telecommunications services, and, as shown above, Time Warner Cable cannot obtain an interconnection agreement in South Carolina without a CPCN. The PSC's

⁵¹ *RLEC Order* at 5.

⁵² *MCI Arbitration Order* at 9, 17.

⁵³ See *Hearing Transcript* at 74; see also *Petition for Reconsideration of RLEC Order* at 2-3.

Order thus has the indisputable effect of prohibiting Time Warner Cable from providing telecommunications services.

In any event, the PSC could not properly refuse to grant a CPCN even if Time Warner Cable sought only to provide VoIP-based services. Of course, if the Commission ultimately determines that VoIP-based services of the sort provided by Time Warner Cable are telecommunications services, then a refusal to grant a CPCN would plainly violate section 253(a). But even if the Commission determines that such VoIP-based services are not telecommunications services, Time Warner Cable should retain the flexibility to structure the wholesale transmission functionality underlying the retail VoIP-based service as a common carrier offering—*i.e.*, a telecommunications service—if it so chooses. Indeed, a service provider may be a common carrier for some purposes and not for others.⁵⁴ The PSC's flat refusal to grant Time Warner Cable a certificate would deny the company that option, and thus would "have the effect of prohibiting" Time

⁵⁴ When the Commission recently adopted the *Wireline Broadband Order* eliminating the requirement that incumbent LECs provide the broadband transmission services underlying their retail DSL services on a common carrier basis, it made clear that the order provides "all wireline broadband providers the flexibility to offer [broadband transmission] in the manner the makes the most sense as a business manner and best enables them to respond to the needs of consumers in their respective service areas," including as a common carrier telecommunications service. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, et al.*, Report and Order and Notice of Proposed Rulemaking, CC Docket No 02-33 et al., FCC 05-150 ¶¶ 89-90 (rel. Sept. 23, 2005). Facilities-based VoIP providers logically enjoy the same flexibility. If the Commission ultimately classifies interconnected VoIP as an information service, Time Warner Cable might determine, depending on interconnection rights accorded to VoIP providers, that offering wholesale transmission as a telecommunications carrier is necessary to protect its rights and to ensure uninterrupted service to its consumers. See *id.* ¶ 73, n.221 (citing *NARUC v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("[I]t is at least logical to conclude that one can be a common carrier with regard to some activities but not others.")).

Warner Cable from providing a telecommunications service as an input to the finished VoIP service.⁵⁵

II. SECTION 253(b) DOES NOT REMOTELY JUSTIFY THE PSC'S REFUSAL TO GRANT A CPCN.

Nothing in Section 253(b) remotely justifies the PSC's denial of a CPCN. The PSC does not appear to argue otherwise; rather, its order appears premised solely on its misreading of section 251(f) and its initial belief that Time Warner Cable can provide the services it seeks to offer without obtaining a CPCN.

With respect to the competitive-neutrality prong of Section 253(b), the Commission's section 253 precedent makes clear that denying a CPCN to a new entrant that has the requisite qualifications, while authorizing the incumbent LEC's provision of service, is not competitively neutral. Indeed, as the Commission has held with respect to comparable "rural incumbent protection provisions,"⁵⁶ such measures represent the antithesis of competitive neutrality, and that fact alone is dispositive under the section 253(b) analysis.⁵⁷ Specifically, giving rural LECs veto rights over the grant of CPCNs to competitors, as the PSC has effectively done here,⁵⁸ "awards those incumbent LECs the ultimate competitive advantage—preservation of monopoly status—and saddles potential new entrants with the ultimate competitive disadvantage—an insurmountable barrier to

⁵⁵ 47 U.S.C. § 253(a).

⁵⁶ *Wyoming Preemption Order*, 12 FCC Rcd at 15655-56 ¶ 37.

⁵⁷ *Id.* at 15658 ¶ 42; *Tennessee Preemption Order*, 14 FCC Rcd at 11072-73 ¶¶ 17-18.

⁵⁸ Notably, the PSC granted Time Warner Cable a CPCN with respect to the one rural service territory where the rural incumbent—Alltel—withdrawed its objection to Time Warner Cable's application. *See Amended Alltel CPCN Order* at 3.

entry.”⁵⁹

In any event, the PSC could not possibly demonstrate that Time Warner Cable’s entry would cause any of the public interest harms specified in section 253(b). The PSC’s decision to deny a CPCN in the RLECs’ service territories, yet to grant a CPCN in Alltel’s rural service area following Alltel’s decision not to oppose, indicates that the RLECs’ objection to Time Warner Cable’s entry was the principal basis for such differential treatment. Not only is such a rationale inconsistent with the Act’s requirement of competitive neutrality, but it clearly shows that the PSC was not acting to protect the public interest. Indeed, the record confirms that, with respect to both the non-rural areas of South Carolina and one rural LEC’s service area, Time Warner Cable in fact has the financial, managerial and technical resources required by the PSC and it meets all of the statutory requirements to operate as a competitive LEC—including the requirements that (1) its provision of service “will not adversely impact the availability of affordable local exchange service” and (2) will not “adversely impact the public interest.”⁶⁰ Having certified that Time Warner Cable possesses these qualifications and that its entry will “be in the best interests of the citizens of the State of South Carolina,”⁶¹ the PSC could not resort to the argument that denying a CPCN to Time Warner Cable for the rural areas in question is somehow “*necessary* to preserve and advance universal

⁵⁹ *Wyoming Preemption Order*, 12 FCC Rcd at 15658 ¶ 42.

⁶⁰ S.C. Code Ann. § 58-9-280(B)(3) (Supp. 2003); S.C. Code Ann. § 58-9-280(B)(5) (Supp. 2003); *see also Initial CPCN Order* at 9-10; *Amended Alltel CPCN Order* at 5.

⁶¹ *Initial CPCN Order* at 11.

service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.”⁶²

Even if the PSC had not issued these explicit findings, nothing in the record remotely suggests that Time Warner Cable’s provision of service in rural South Carolina would harm universal service or public safety or otherwise jeopardize service quality or consumers’ rights. To the contrary, as noted above, Time Warner Cable voluntarily submitted to the same requirements that govern competitive LECs, including contributions to the state and federal universal service support mechanisms, the payment of access charges where applicable, and the provision of E911 service, among other things. Thus, there is simply no basis—and the PSC cited none—for concluding that the denial of a CPCN could be justified under Section 253(b).

⁶² 47 U.S.C. § 253(b) (emphasis added).

Conclusion

For the foregoing reasons, the Commission should issue an order preempting the PSC's *RLEC Order*. The PSC's refusal to grant Time Warner Cable a CPCN with respect to the state's rural service territories denies business and residential customers a choice of service providers in violation of Section 253. The Commission therefore should preempt the PSC's decision and direct it to grant Time Warner Cable the CPCN for which it applied.

Respectfully submitted,



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March 1, 2006

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MAR - 1 2006

Federal Communications Commission
Office of Secretary

In the Matter of

**Petition of Time Warner Cable
for Preemption Pursuant to Section 253
of the Communications Act, as Amended.**

Docket No. _____

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